No. 87-382 (5)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1987

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, RODERICK G.W. CHU, as Commissioner of Taxation and Finance of the State of New York, and THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Petitioners,

against

HERZOG BROTHERS TRUCKING, INC., a/k/a Herzog Brothers, Inc., GREGORY HERZOG, GARY HERZOG, STEPHEN HERZOG and DAVID HERZOG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENTS' RESPONSE TO MOTION OF THE SENECA NATION OF INDIANS FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The motion of the Seneca Nation of Indians for leave to file a brief *amicus curiae* should be denied. No tribal interest is adversely affected by the decision of the Court

of Appeals, which held that *the State* could not tax or otherwise regulate Herzog's sales of motor fuel to Indians on Indian reservations. Although respondents concur with the movant's request that certiorari be denied, respondents object to the consideration of proposed regulations now being reviewed by the State of New York and negotiations between the Seneca Nation of Indians and the State of New York. These matters should not affect the disposition of this case. The motion is also untimely.[1]

I. ARGUMENT

A. Proposed regulations and negotiations between the Seneca Nation of Indians and State of New York are irrelevant and immaterial.

This declaratory judgment action concerns the regulation by the State of New York and imposition of its motor fuel and sales taxes upon respondents with respect to wholesale sales of motor fuel made by respondent Herzog Brothers Trucking, Inc. ("Herzog") to Seneca Indians on Indian reservations. State motor fuel and sales taxes in excess of $400,000 have been assessed against Herzog for the period through June 30, 1985. Herzog's potential tax liability under existing law regarding sales to Indians for subsequent periods also is at issue. Thus, this case involves an existing controversy between petitioners and respondents based on past and current events and the application of the law in effect.

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[1] A motion for leave to file a brief *amicus curiae* must be filed within the time allowed for the filing of the brief in opposition to the petition for a writ of certiorari. Rules of the Supreme Court, Rule 36.1. Pursuant to Rule 22.1, that time is measured from 30 days after receipt of the petition by the respondents. The petition in this case was docketed in the Supreme Court of the United States on September 3, 1987 and received by respondents' counsel on September 5, 1987.

The motion of the Seneca Nation of Indians is based on certain proposed regulations being considered by petitioners and negotiations between the Seneca Nation and petitioners with respect to the prospective collection of state taxes. It is stated at page "ii" of the motion that certain negotiations between the Seneca Nation of Indians and petitioners ". . . may resolve the matters at issue in this case." The Seneca Nation of Indians further states that ". . . the proposed regulations should first be presented to the court below, without action by this Court," and that the effect of such proposed regulations and negotiations on tribal interests should be considered in the context of this case. But nowhere does the Seneca Nation of Indians explain how such proposed regulations or negotiations could affect the assessments previously rendered by the petitioners against Herzog or the other subject matter of this case.[2]

The decision of the Court of Appeals was not based on the ultimate disposition of motor fuel purchased by the Indian vendors from Herzog. The decision simply held that *state* taxation or regulation of Herzog's sales to such Indians is pre-empted by federal law. (Opinion of the Court of Appeals, pages 13-14 of the appendix to the petition). Thus, no tribal interests were adversely affected by the decision, only the attempted taxation and regulation of such sales by the State.

New state regulations cannot supercede the Indian trader statutes. This Court, in *Central Machinery Company v. Arizona Tax Commission*, 448 U.S. 160, 166 (1980), held that nothing short of repeal or modification of the Indian trader statutes *by Congress* could alter their pre-emptive effect.

[2] Herzog has not been a participant in the negotiations between the petitioners and the Seneca Nation of Indians. The petitioners themselves have not indicated how such negotiations might be dispositive of the State's claims against respondents.

The Seneca Nation of Indians argues that it has a tax and regulatory scheme for the wholesale and retail distribution of sales of motor fuel on its reservations and that it also operates two retail facilities. The Seneca Nation apparently seeks to litigate in the context of this action the possible application of these proposed regulations to its own operations. However, a judicial determination of that issue must await an actual case or controversy between the State and the Seneca Nation of Indians.

It would be improper for this Court to sanction advisory opinions in the courts below regarding the proposed regulations so that this Court can later review such opinions. Neither the federal courts nor New York's courts render advisory opinions. *Compare Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) *with Matter of Workmen's Compensation Fund*, 224 N.Y. 13, 16 (1918).

Thus, New York's courts will not render an advisory opinion as to whether the "proposed regulations" may be constitutionally applied to the Seneca Nation's own operations. The effect of proposed regulations with respect to the future collection of taxes is not ripe for determination by any court, since there is no pending "case" or "controversy" between the State and the Seneca Nation as to such matters.

II. CONCLUSION

The motion of the Seneca Nation of Indians for leave to file a brief *amicus curiae* should be denied. However, even if such motion is granted, the petition for a writ of certiorari should be denied for the reasons set forth in respondents' brief in opposition..

Dated: Buffalo, New York
June 17, 1988

Respectfully submitted,

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